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82-1974

NO. 82-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF MACON,

Petitioner

v.

C. D. JOINER, et al.,

Respondents

75pp

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

W. WARREN PLOWDEN, JR.

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QUESTION PRESENTED

Is the provision of local public transit service one of the "traditional governmental functions" which is exempt from commerce clause regulation under National League of Cities v. Usery, 426 U.S. 833 (1976)?

The same question is presented in Case No. 82-1951, Donovan v. San Antonio Metropolitan Transit Authority, appeal docketed June 1, 1983.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit were as follows:

Appellant: City of Macon

Appellees: C.D. Joiner, Harold T. Bone, Sam Miles, Joseph D. Moore, Paul W. Lanford, Marvin A. Griffin, John C. Fordham, George L. Hamlin, Rogers L. Loyd, Willie H. Thomas, C.W. McCoy, Patricia Ann Clyde, Aaron Baron,

Larry Tobler, Shirley A. Peak, Oscar Lee Hallman, Kelvin Jones, Andrew B. Turk, Laverne Singleton, Deborah Ann Pitts, Shelton Lewis Gurr, Louis Turner, Addis Theo Baird, Frank Rutland, Betty Louise Knight, Darryl L. Miller, Marilyn Tarver, Walter L. Jackson, Sr., Roy D. Smuthers, Ira Jarriel, Walker T. James, Joseph McElroy, Dorothy A. Carter and Francis D. Beasley.

Intervenor: United States of America.

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No. 82-

CITY OF MACON,

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v.

C.D. JOINER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The City of Macon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in the above-entitled case.

OPINIONS BELOW

The Opinion of the District Court, C.D. Joiner, et al. v. City of Macon, No. 79-287-MAC (M.D. Ga. April 27,

1981) is unreported. The Opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 699 F.2d 1060 (11 Cir. 1983) and is reproduced in the Appendix at page 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on March 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectfully, or to the people."

STATEMENT OF THE CASE

This is an action by employees of the City of Macon seeking injunctive

relief, backpay, liquidated damages and attorneys' fees pursuant to the overtime provisions of the Fair Labor Standards Act, as amended, 29 U.S.C. §§ 201-219. The jurisdiction of the district court was invoked under 28 U.S.C. § 1337 and 29 U.S.C. § 216(b).

The City of Macon admitted that its transit operators had not been paid overtime compensation in accordance with the provisions of the Fair Labor Standards Act, but defended its action upon the contention that its operation of the Macon Transit System was exempt from the provisions of the Act by virtue of this Court's decision in National League of Cities v. Usery, 426 U.S. 833 (1976).

Both parties moved for summary judgment and on April 27, 1981, the district court entered an order finding that the Macon Transit System was not

exempt and granting the plaintiffs' motion. The court of appeals affirmed in a decision issued on March 7, 1983.

The City of Macon operated[1] the Macon Transit System pursuant to the Constitution of the State of Georgia and the Charter of the City of Macon. Ga. Const., art. 9, § 4, ¶2, Charter, § 1-102; Code of Ordinances, § 10-1001. It was administered like any other

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[1]On May 1, 1981 the City of Macon transferred all of its interest in the buses and personal property used to operate the transit system to the Macon-Bibb County Transit Authority which had been created at the 1980 session of the Georgia General Assembly. Ga. Laws 1980, p. 4313 et seq. At that time the plaintiffs became employees of the transit authority and their continuing claims for overtime wages were likewise transferred to the authority. However, as part of the process of setting up the authority the City agreed to remain responsible for all pending lawsuits including the instant case and will be liable for any amounts which might be due and owing to its former employees up until May 1, 1981.

department of the City by a department head who was responsible to the mayor for the performance of the department (R. 54).

Prior to December 31, 1972, public transit facilities in the City of Macon were operated by Bibb Transit Company, a privately owned corporation that had a franchise from and was regulated by the city. On November 23, 1971, and again on August 29, 1972, Bibb Transit advised the city that it was its firm intention to cease operations and surrender its franchise on December 31, 1972 due to financial exigency.

Bibb Transit ceased operations at 12:00 midnight on December 31, 1972, and the City of Macon was without transit service for a period of approximately two weeks. On about January 15, 1973, Bibb Transit reopened

its facility and provided transit service in Macon pursuant to an agreement with the city whereby it would be paid $25,000 to offset the operating deficit it incurred during a two month period. (R. 55).

Thereafter, the Mayor and Council adopted a resolution authorizing the purchase of the buses, service vehicles, tools, maintenance equipment, and office furniture from Bibb Transit, entered into a lease of the real estate located at 815 Riverside Drive and commenced operation of a publicly-owned transit system in Macon. (R. 55-56).

Funds to operate the Macon Transit System are derived from fares, advertising, charters and operational subsidies provided by the City of Macon (R. 56). In addition, the city has used federal revenue sharing funds

and local tax funds to purchase new buses. The system operates at a huge loss. As of March 31, 1980, the operating subsidy put into the system by the city of Macon since it commenced operation of the system on March 15, 1973 was $2,627,466.00 (R. 152). The city has been unable to qualify for an Urban Mass Transit Administration operational grant, see, City of Macon v. Marshall, 439 F. Supp. 1209 (M.D. Ga. 1977) and, therefore, the only source of funds to make up the operating deficit is city taxes.

Fares charged by the Macon Transit System were nominal, the same being thirty-five cents for a regular fare, ten cents for a transfer and twenty cents for a student fare. There are no other transit services offered by public or private concerns within the City of Macon (R. 139).

REASONS FOR GRANTING THE WRIT

In National League of Cities v. Usery, 426 U.S. 833 (1976) this Court held that under the tenth amendment and our system of federalism, Congress could not exercise its legislative authority under the commerce clause so as to "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions . . . ." 426 U.S. at 852.

The Court therefore concluded that Congress' attempt to extend the minimum wage and overtime provisions of the Fair Labor Standards Act to states and local governments was constitutionally impermissible as to most employees of states and their political subdivisions.

Since National League, the Court has addressed the application of its

holding to other federal regulatory statutes in Hodel v. Virginia Surface Mining & Reclamation Association, Inc., 452 U.S. 264 (1981), F.E.R.C. v. Mississippi, 102 S.Ct. 2126 (1982) and EEOC v. Wyoming, 103 S.Ct. 1054 (1983). And in United Transportation Union v. Long Island Railroad Co., 455 U.S. 678 (1982) the Court reaffirmed its earlier cases holding that the operation by a state of a railroad in interstate commerce is "not an integral part of traditional state activities generally immune from federal regulation . . . ." 455 U.S. at 685. However, the Court has not had or taken the opportunity to "fully explore the extent of 'traditional' state functions." F.E.R.C. v. Mississippi, 102 S.Ct. 2126, 2149 n. 7 (1982) (O'Connor, J., dissenting).

Among the "traditional functions" identified by the Court in National

League of Cities were police and fire protection, sanitation, public health, parks and recreation, schools, and hospitals. 426 U.S. at 851, 855. This list is "not an exhaustive catalog," and there are "numerous line and support activities which are well within the area of traditional operations of state and local governments." Id. at 851 n. 16.

With the exception of the railroad cases, the Court has provided little specific guideance as to how one determines the nature of the activities which are protected under National League. The Court did note that state and local immunity extends to "areas of traditional governmental functions" Id. at 852, to "area[s] the States have regarded as integral parts of their governmental activities" Id. at 853 n. 18, to "those governmental services

which States and their political subdivisions have traditionally afforded their citizens" Id. at 866, and to "activities [that] are typical of those performed by state and local governments in discharging their dual functions of administering the public law and furnishing public services," Id. at 861. One could reasonably assume that the terms "traditional" and "integral" as used in this context refer to activities of a responsible government which are essential to the well being of its citizen and which can be affectively provided only by the public sector, regardless of whether at some time in the past private business was involved in providing the service.

However, cases litigated in the lower courts dealing with the issue of what is a traditional governmental function have produced decidedly

mixed results.

In Enrique Molina-Estrada v. Puerto Rico Highway Authority, 680 F.2d 841 (1st Cir. 1982) the plaintiffs contended that a public highway authority was outside the National League principle because it had the power to operate a mass transportation system (and intended to build one), operated parking lots, and charged a fee for the use of its highways. The First Circuit held that these activities, among others, were "sufficient to indicate that the Authority is responsible for 'traditional' or 'integral' governmental activities," Id. at 845, and therefore is immune from FLSA. Relying upon Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979), the Court could find "no meaningful distinction between the Authority's activities, and those, for example, of a municipal airport, . . . or the

parks, recreation and public health activities mentioned in National League of Cities itself." Id. at 846. In discussing this issue, the First Circuit lumped together "health services, recreational services, airport services and city transit." Id.

In Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979), the Court considered the application of the FLSA to a municipal airport operated by the City of Cleveland and determined that it was an integral governmental function within the meaning of National League. The court first concluded that the National League test must be given a flexible interpretation:

> Although the opinion of the court does not contain a specific outline of the dimensions of the state sovereignty limitation, the definition suggests that the terms

> 'traditional' or 'integral' are to be given a meaning permitting expansion to meet changing times.

598 F.2d at 1037. The court then identified four elements which it found common to all of the traditional functions identified by this Court in National League and which should be considered in determining whether a governmental function is entitled to state sovereignty immunity:

> (1) the government service or activity benefits the community as a whole and is available to the public at little or no direct expense;
>
> (2) the public service or activity is undertaken for the purpose of public service rather than for punicary gain;
>
> (3) the government is the principal provider of the service or activity; and
>
> (4) the government is particularly suited to provice the service or perform

> the activity because of a community wide need for the service or activity.

598 F.2d at 1037.

In the instant case and Kramer v. New Castle Transit Authority, 677 F.2d 308 (3d Cir. 1982), cert. denied 103 S. Ct. 786 (1983), the courts of appeal did not rely upon the criteria identified in Amersbach nor have they sought to develop any other standards to ascertain the identity of a traditional governmental function. Rather, they have put excessive emphasis upon the fact that at one time in our nation's history most public transportation systems were in the private sector, and have only paid lip service to the Court's statement in United Transportation Union that the Court was not "impos[ing] a static historical view of state functions generally immune from federal regulation." 455 U.S. at

686.

These decisions have also placed emphasis to some degree upon the fact that the federal government has a strong interest in the operation of local transit systems by virtue of large amounts of money appropriated by Congress under the Urban Mass Transportation Act, 49 U.S.C.A. §§ 1601 et seq., and that this somehow prevents transit from being a traditional governmental function because transit and its labor relations policies are now a national program. However, this line of reasoning is directly contrary to the Court's decision in Jackson Transit Authority v. Amalgamated Transit Union, Local 285, 102 S.Ct. 2202 (1982). (Congress did not create a body of federal law to govern transit labor relations).

Finally, in San Antonio Metro-

politan Transit Authority v. Donovan, 557 F. Supp. 445 (W.D. Tex. 1983), the district court has on two occasions considered the question of whether the operation of a local mass transit system is a traditional governmental function, and most recently, following remand from this court, 102 S.Ct. 2897 (1982), has again held that transit is traditional. The court determined that although transit companies for the most part had been operated by the private sector until recent times, the "historical reality of mass transit reveals a long record of state concern and activity in the field." 557 F. Supp. at 448. It also considered the recent conversion of mass transit to the public sector and concluded that this conversion did not have the prohibited affect referred to in United Transportation Union of

"erod[ing] federal authority in areas traditionally subject to federal statutory regulation." 455 U.S. at 687. The court then identified several other facts which indicated that transit "is presently a basic state prerogative, interference with which would impede the state's ability to fulfill their role in the federal system . . .," 457 F. Supp. at 447, and concluded that imposition of the overtime provisions of the FLSA "would undermind the state's role as surely as would the imposition of the same provisions on state employees performing police, fire, sanitation, health and recreational services," 457 F. Supp. at 454.

These cases raise several important questions with regard to the identity of a traditional governmental function which have not been adequately

addressed by the courts below and on which no apparent consistency has developed in the reported cases. For example, is the question of historical reality limited to looking at public v. private ownership of the means of providing the service, or does it matter that the development and maintenance of a local transportation infrastructure is one of the oldest, most fundamental functions of state and local government? Present reality is that about ninety percent of transit revenues, total transit miles and linked passenger trips are attributable to publicly-owned mass transit systems. Should not these facts be considered along with the relatively recent conversion from private to public ownership? Is the relatively recent extension to transit operations of the minimum wage and overtime

provisions of the FLSA sufficient to support a finding of a longstanding federal regulatory scheme that will be eroded by the grant of tenth amendment immunity? What weight, if any, should be given to the fact that the states and congress consider public transportation to be an essential state function? Does it make any difference that Congress has appropriated federal funding to support the operation of local transit systems in light of the fact that Congress has also provided massive federal aid for law enforcement, fire protection, education, public health, parks and recreation and sanitation?

CONCLUSION

Petitioner respectfully suggests that the law on this issue has evolved to the point that the Court should give this case plenary consideration to

resolve the conflicts which have developed and give the lower courts appropriate guidance in applying the National League decision to transit as well as the numerous other line and support functions carried out by state and local governments.

Respectfully submitted.

W. WARREN PLOWDEN, JR.
Counsel of Record

Jimmy Allen ALEWINE, et al.,
Plaintiffs-Appellants.

v.

CITY COUNCIL OF AUGUSTA, GEORGIA,
Defendant-Appellee.

C.D. JOINER, on behalf of himself
and others similarly situated,
Plaintiffs-Appellees,

v.

CITY OF MACON,
Defendant-Appellant.

Nos. 81-7490, and 81-7789.

United States Court of Appeals,
Eleventh Circuit.

March 7, 1983

Before TJOFLAT and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

HATCHETT, Circuit Judge:

These cases, consolidated on appeal, require that we decide whether a municipality's operation of an urban mass transit system constitutes a traditional governmental function.

If so, the tenth amendment limitation upon congressional exercise of the commerce power bars application of the overtime compensation provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C.A. § 207 (Supp. 1982), to those public employees engaged in urban mass transit service. If not, the overtime compensation provisions of the FLSA are applicable and require the municipality to pay mass transit employees time and one-half for all hours worked in excess of forty per work week. We hold that publicly-owned mass transit is not a traditional governmental function in these cases.

I. BACKGROUND

A. Proceedings Below

Jimmy Allen Alewine and a class of bus drivers of the Augusta Transit Department brought suit against the City Council of Augusta (Augusta) seeking to

recover overtime pay under the FLSA, 29 U.S.C.A. § 207 (Supp. 1982), and under a similar provision of the Augusta City Code, § 2-48.[1] The complaint alleged that Augusta's operation

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[1]Section 2-48 of the Code of the City of Augusta, 1972, as amended, provides in pertinent part:

> The number of hours of work to be observed by any employee in any department of the City Council . . . except all employees of the City Council engaged in the paving, macadamizing, or otherwise improving for travel the streets and alleys of the City, or in connection with the curbing and guttering of such streets and alleys, shall not exceed forty hours per work week.
>
> [S]uch time devoted by such employee in excess of a forty hour work week shall be allowed the employee as overtime with time and one-half pay.

The City of Augusta argued in the district court that the plaintiff bus drivers were exempt from the overtime provisions of the ordinance because the bus drivers "are engaged in the paving . . . or otherwise improving for travel the streets and alleys of the City" in that their duties relieve traffic congestion and reduce pollution. Rejecting this

of a bus service was not a traditional governmental function; and therefore, the plaintiff drivers were entitled to overtime pay for all hours worked in excess of forty per week beginning May 1, 1976. The City of Augusta acknowledged that the FLSA on its face applied and required payment of overtime after forty hours, but contended that application of the FLSA was unconstitutional in light of the Supreme Court's invalidation of the overtime provisions as applied to certain state and local governmental employees in National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

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1 Cont. argument, the district court noted that "[s]uch an interpretation of the clear language of the ordinance requires elasticity of logic and agility of linguistic ability this Court does not possess." 505 F. Supp. at 891. Providently, the City of Augusta has refrained from reasserting this argument on appeal.

The district court held that the municipal bus system in Augusta is an integral operation of a traditional governmental function and therefore the FLSA's overtime provisions may not constitutionally apply to the system's employees. Alewine v. City Council of Augusta, 505 F. Supp. 880, 889 (S.D. Ga. 1981). Exercising pendent jurisdiction over the municipal ordinance claim, the district court awarded partial backpay to the plaintiff bus drivers for hours worked in excess of forty per week since May 1, 1976. The court determined that, in view of the City of Augusta's good faith throughout the time period relevant to the lawsuit, equity required an award of less than full backpay for violation of the municipal ordinance. Thus, the court limited the plaintiffs' recovery to two-thirds

of the back pay sought. 505 F. Supp. at 893-94. The plaintiff bus drivers bring this appeal.

In a similar case, C.D. Joiner and a class of employees of the Macon Transit System sued the City of Macon (Macon) seeking a monetary recovery for hours worked in excess of forty per week since May 1, 1976, and a permanent injunction compelling Macon to pay time and one-half for overtime in the future. The plaintiff class alleged that a public transit system such as that in Macon, which serves only a portion of the community's citizens, is not a traditional governmental function. Taking the contrary position, Macon contended that employees of a publicly-owned mass transit system provide a traditionally governmental service and are therefore not covered by the FLSA. Even if public mass transit

were considered a traditional governmental function, Macon argued that the invalidation of the overtime provisions to certain state and local governmental employees in National League precludes application of those provisions to all local government employees in the absence of a constitutionally valid amendment to the FLSA.

The district court found that the City of Macon's urban mass transit system is not an integral operation in the areas of traditional governmental functions and therefore held the overtime provisions of the FLSA constitutionally inapplicable to the plaintiff class of municipal transit employees. In addition, the district court rejected the City of Macon's argument that, because the overtime provisions of the FLSA have been

held inapplicable to certain state and local governmental employees, the overtime provisions are inapplicable to all such employees in the absence of a congressional re-enactment of a constitutionally valid amendment. Citing the FLSA's severability clause,[2] which calls for application in the event the FLSA is found unconstitutional as applied to certain employees, the district court entered partial summary judgment for the plaintiff class of employees.[3] The City of Macon brings this appeal.

B. Facts

Alewine v. City Council of Augusta

Prior to 1950, local bus service in

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[2]Title 29 U.S.C.A. § 219 (1975). See Part II-C of this opinion for the text of this section.

[3]The district court certified this interlocutory appeal pursuant to 28 U.S.C.A. § 1292(b) (1966).

Augusta was provided by the Georgia Power Company. In 1950, the Augusta Coach Company, a privately-owned corporation, purchased the service from Georgia Power and began operating local bus service under a franchise granted by the City of Augusta. Citing steady decreases in net income and working capital, Augusta Coach notified the City of Augusta in early 1973 that it intended to discontinue service. In April, 1973, the City of Augusta executed an option to purchase the assets of the Augusta Coach Company and for six months thereafter, Augusta provided operating assistance to Augusta Coach while an application for federal assistance under UMTA was prepared. By letter dated November 7, 1973, the City of Augusta purchased the assets of Augusta Coach with federal assistance and commenced local

transit operations through the Augusta Transit Department on November 21, 1973.

Augusta stipulated that had it not been for the federal grant it would not have purchased the assets of the Augusta Coach Company. Subsequent applications for capital assistance and operating grants were approved by the Urban Mass Transportation Administration. Under the terms of the grant contract, the City of Augusta guaranteed that its acquisition of the bus system would not adversely affect the system's employees, that all existing rights and benefits of employees would be continued, and that it would enter into a collective bargaining relationship with the plaintiff bus drivers' union. This guarantee was required by UMTA, 49 U.S.C.A. § 1609(c) (1976).

The bus service provided by the

Augusta Transit Department is similar to that provided by the Augusta Coach Company prior to the public takeover. Fixed route scheduled bus service and charter services are provided. The transit department retained the drivers and non-operating personnel employed by the Augusta Coach Company and continues to charge passengers a fare for riding the bus. Although non-operating employees are paid overtime compensation at time and one-half for hours beyond forty per work week, the plaintiff bus drivers are paid overtime only after forty-eight hours.

Since the City of Augusta's acquisition of the local transit system, the federal government through the Urban Mass Transportation Administration has been extensively involved with the system. The federal government has provided funding for

approximately 80% of the transit department's total capital outlays. With federal assistance, Augusta has purchased new buses, constructed new bus shelters, and renovated the transit department's maintenance garage. One-half of the system's operating deficit is financed by the federal government. Furthermore, were it not for the operating grants from the federal government, the City of Augusta could not afford to operate the local transit system.

On this record, the district court held that the FLSA may not constitutionally apply to the plaintiff employees of the transit department because "the operation of the City Transit Department of Augusta is an integral operation of traditional governmental function." 505 F. Supp. at 889. The district court further held that Augusta

had not waived its constitutional defense by accepting federal funds pursuant to the UMTA, 49 U.S.C.A. § 1602 (Supp. 1982), and that the terms of the agreement between Augusta and the federal government did not require compliance with the FLSA. Recognizing the difficulty of the question and the sparse guidance provided by National League the district court concluded, however, that traditional governmental functions need not be "time honored, hoary, or historic," but include "those which the public has come to expect and demand in light of the change of times and needs of society." 505 F. Supp. at 889. Relying in part upon Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979), the court determined that a municipal transit system, like the public airport in Amersbach, qualifies as a traditional

function because (1) it benefits the whole community; (2) it is available to the public at a small cost; (3) it is undertaken for public service rather than financial gain; and (4) the municipality is the principal provider of the bus service and is particularly suited to provide the service. As mentioned above, the district court did award backpay at a reduced rate based on the Augusta municipal ordinance which provides the same overtime scale as the FLSA.

Joiner v. City of Macon

Prior to December 31, 1972, the Bibb Transit Company, a private corporation, owned and operated the public transit facilities in Macon pursuant to a franchise granted by the City of Macon. Bibb Transit notifed the City of Macon on November 23, 1971, and again on August 29, 1972, that it intended to

cease operations and surrender its franchise due to financial exigency. As promised, Bibb Transit ceased operations on December 31, 1972, and for the next two weeks, Macon was without transit service. On January 15, 1973, Bibb Transit agreed to resume operations for two months in return for a $25,000 operating subsidy made available to Macon by the State of Georgia.

In accordance with the terms of a city council resolution passed on March 6, 1973, Macon purchased and assumed possession of the assets of the Bibb Transit Company. Macon then commenced operation of the transit system as Macon Transit System. The eleven routes served by Macon Transit are basically the same as those provided by Bibb Transit when it ceased operations

in 1972.[4] Out of a population of approximately 100,000 Macon Transit serves approximately 8,900 fares per day. The district court found that the typical passenger is female (66%), black (89%), middle-aged (80%), low income (80%), and "transit captive" (95%), that is, living in a household without an automobile available to it. Approximately 20% of all passengers are going to and from work.

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[4]On May 1, 1981, the City of Macon transferred all of its interest in the transit system to the Macon-Bibb County Transit Authority which was created at the 1980 session of the Georgia General Assembly. Ga. Laws 1980, p. 4313 et seq. The plaintiffs then became employees of the Transit Authority and their claims for overtime wages were transferred to the Authority. However, as part of the process of setting up the Authority, the City agreed to remain responsible for all pending lawsuits including the instant case and will be liable for any amounts found due and owing to its former employees up until May 1, 1981.

Macon Transit System is funded through fares, charter income, advertising revenues, and operating subsidies provided by the City of Macon. In addition, Macon has obtained federal revenue sharing funds and state grants to cover capital outlays. Macon applied to obtain federal funding for Macon Transit pursuant to the Urban Mass Transportation Act (UMTA), 49 U.S.C.A. § 1602 (Supp. 1982). The application was denied because Macon failed to comply with section 13(c) of the UMTA, 49 U.S.C.A. § 1609(c) (1976), relating to protections for employees. See City of Macon v. Marshall, 439 F. Supp. 1209 (M.D. Ga. 1977). Consequently, the system operates at a substantial loss. No other transit services are offered by public or private concerns within the City of Macon.

Based on these facts, the district court held that the City of Macon must comply with the overtime provisions of the FLSA. The district court determined that Macon Transit was not a traditional governmental function because of its close resemblance to the commercial activities of a private business. The court noted that the routing, scheduling, and administration of Macon Transit continued in the same fashion as that of its predecessor, the Bibb Transit Company. The district court concluded that compliance with the FLSA would not directly displace Macon's ability to structure employment relationships with transit employees because the large majority of transit systems throughout the country provide overtime pay for work in excess of forty hours per week without apparent disruption.

On appeal, all parties agree that the question of law before us is not dependent upon the specific facts regarding Augusta's or Macon's transit system. Macon contends that the district court misread National League in holding that publicly-owned mass transit is not a traditional governmental function. According to Macon, compliance with the FLSA's overtime requirements displaces a municipality's ability to structure employer-employee relationships. Macon contends that it is this function that is essential to a municipality's independent existence and traditionally governmental under the reasoning of National League. The plaintiff class of employees in Joiner v. City of Macon argues that Macon's construction of National League immunizes from federal regulation virtually any essential activity performed

by a governmental body. The plaintiff class further argues that Macon's failure to focus on mass transit from a historical perspective ignores the emphasis placed on tradition in National League.

The plaintiff class of bus drivers in Alewine v. City Council of Augusta also contends that the district court misread National League in finding that publicly-owned mass transit is a traditional governmental function. The Augusta plaintiff class argues that because state and local governments became involved in urban mass transit primarily because of federal funding beginning in 1964, local mass transit cannot be deemed traditionally governmental in any sense of the term.

II. DISCUSSION

A. The Fair Labor Standards Act

In 1938 Congress enacted the Fair

Labor Standards Act requiring employers covered by the Act to pay employees minimum wages plus overtime at one and one-half times their regular rate of pay for hours worked in excess of forty per work week. 29 U.S.C. §§ 206, 207 (1940 ed.). The United States Supreme Court upheld the Act as a valid exercise of congressional authority under the commerce power. See United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941). The FLSA as originally enacted specifically excluded from the term "employer" states and their political subdivisions. 29 U.S.C. § 203(d) (1940 ed.). With amendments in 1961, Congress extended coverage of the minimum wage and overtime provisions to certain types of public employers. The 1961 amendments extended coverage to those persons employed in enterprises engaged in commerce

or in the production of goods for commerce. 29 U.S.C. §§ 203(r), 203(s), 206(b), 207(a)(2) (1964 ed.). In 1966 Congress again amended the definition of "employer" and removed the exemption previously extended to the states and their political subdivisions with respect to employees of state hospitals, institutions, and schools. 29 U.S.C. § 203(d) (1964 ed. Supp. II). These amendments were upheld against constitutional attack in Maryland v. Wirtz, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968).

In 1974 Congress enacted the most recent in the series of broadening amendments to the FLSA. By those amendments, the definition of "employer" specifically includes "a public agency," which is defined as including "a state or political subdivision thereof." 29 U.S.C. §§ 203(d), (x) (1970 ed. Supp. IV). By

the 1974 amendments therefore, Congress removed the exemption previously afforded states and their political subdivisions and imposed upon almost all public employment the minimum wage and maximum hour requirements previously restricted to employees of private entities engaged in interstate commerce. The 1974 amendments, in addition to extending the FLSA's coverage to most public employees, also repealed the special overtime exemption for mass transit personnel. See 29 U.S.C. § 213(b)(7) (1970 ed. Supp. IV). The Supreme Court addressed the constitutionality of these amendments in National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976).

In National League, individual states, cities, and organizations brought suit against the Secretary of Labor to

test the validity of the 1974 amendments extending the statutory minimum wage and maximum hours provisions to employees of states and their political subdivisions. Acknowledging that traditional governmental activities which affect interstate commerce would be within the reach of congressional power under the Commerce Clause if performed by private entities, the Court stressed, however, that the tenth amendment imposes an affirmative limitation on the exercise of the commerce power. The Court stated that Congress cannot, consistent with the tenth amendment, enact legislation which deprives the states of those attributes "'essential to [their] separate and independent existence.'" National League, 426 U.S. at 847, 96 S.Ct. at 2472 (quoting Coyle v. Smith, 221 U.S. 559, 580, 31 S.Ct. 688, 695, 55 L.Ed. 853 (1911). The Court

held that "insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by art. I § 8, Cl. 3." 426 U.S. at 852, 96 S.Ct. at 2474 (footnote omitted). As examples of integral governmental functions, the Court listed fire prevention, police protection, sanitation, public health, and parks and recreation. The Court noted that "[t]hese examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments." 426 U.S. at 851 n. 16, 96 S.Ct. at 2474 n. 16. By specifically overruling Maryland v. Wirtz, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), the National

League Court implicitly included public schools and hospitals as examples of other traditional operations of state and local governments.

The Supreme Court summarized its holding in National League in Hodel v. Virginia Surface Mining & Reclamation Assoc., 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981). The Court concluded that National League imposes a three-part test for determining whether commerce clause legislation transgresses the tenth amendment:

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged regulation regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty" and third, it must be apparent that the States' compliance

> with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

452 U.S. at 287-88, 101 S.Ct at 2366 (citations omitted).[5] It must be noted that the Hodel reiteration of the holding in National League is useful only when determining whether a particular federal regulatory scheme is unconstitutional under National League. The Supreme Court already applied the three Hodel standards to the FLSA in National League, and concluded that the attempted extension of the FLSA was not within the authority granted Congress by the Commerce Clause. Thus, Hodel merely provides guidance in

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[5]Political subdivisions are accorded the same status as states under National League. See 426 U.S. at 855 n. 20, 96 S.Ct. at 2476 n. 20; Williams v. Eastside Mental Health Center, 669 F.2d 671, 677 n. 7 (11th Cir.), cert. denied, ___ U.S. ___, 103 S.Ct. 318, 74 L.Ed.2d 294 (1982).

determining whether other federal regulatory schemes, such as the Surface Mining Control & Reclamation Act in Hodel, are constitutionally barred by the tenth amendment when analyzed under the same guidelines as the FLSA amendments in National League. Hodel offers little guidance for the identification of traditional governmental functions. For that, we turn elsewhere.

B. Publicly-owned Urban Mass Transit-A Traditional Governmental Function?

The distinctive characteristic of those "protected" activities identified in National League as traditionally governmental is that they are all functions which the states have historically provided their citizens. In describing the state and local functions immune from federal regulation under the FLSA, the National League Court repeatedly employed the

adjective "traditional."[6] Only through gross oversight could we ignore the conceptual attribute of "traditional" when determining whether public mass transit is an integral governmental function.

A number of courts have confronted this issue and have concluded that the

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[6] See, e.g., 426 U.S. at 849, 96 S.Ct. at 2473:

"The degree to which the FLSA amendments would interfere with traditional aspects of state sovereignty can be seen even more clearly upon examining the overtime requirement of the Act"; 426 U.S. at 851, 96 S.Ct. at 2474: "it is functions such as these which governments are created to provide, services such as these which the States have traditionally afforded their citizens"; 426 U.S. at 851 n. 16, 2474 n. 16: "These examples are obviously not an exhaustive catalogue of the numerous line and support activities which are well within the area of traditional operations of state and local governments"; and 426 U.S. at 852, 96 S.Ct. at 2474: "Integral operations in areas of traditional governmental functions . . ."

maximum hour provisions of the FLSA cannot constitutionally be applied to public transit employees. See, e.g., Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841 (1st Cir. 1982); Dove v. Chattanooga Transp. Auth., 539 F. Supp. 36 (E.D. Tenn. 1981), appeal docketed, No. 81-56-36 (6th Cir. Sept. 2, 1981).[7] We choose not to

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[7] In Molina-Estrada, part-time highway construction employees sued the Authority for additional wages under the FLSA. The First Circuit held that the activities of the Authority were an integral part of the Commonwealth Government and could therefore be termed traditional governmental functions. Although the record was unclear as to the Authority's actual activities, the court noted that "the Authority arranges for the building of roads, sometimes builds roads itself, operates toll roads, keeps its roads in repair and (we take appellants' word for it) operates some parking lots and plans to build a mass transit system." 680 F.2d at 845. Because a public mass transit system was listed and referred to by the parties as only a possibility, the Third Circuit omitted from discussion of the National League analysis any mention of public mass transit as a traditional governmental function.

follow these decisions, however, in light of United Transp. Union v. Long Island R.R., ____ U.S. _____, 102 S. Ct. 1349, 71 L.Ed.2d 547 (1982). In Long Island R.R., the Supreme Court unanimously reversed the Second Circuit and held that a state-owned and operated railroad primarily engaged in commuter transportation in metropolitan New York City is not a traditional government function within the meaning of National League. The Court concluded that the tenth amendment did not bar application of the Railway Labor Act (including its right to strike) to employees of the commuter railroad. Just as we do here, the Long Island R.R. Court focused on that prong of the Hodel standard which examines whether compliance with the federal statute in question directly impairs the state's ability "'to structure integral operations in areas

of traditional functions.'" Long Island R.R., ____ U.S. at _____, 102 S.Ct. at 1353, 71 L.Ed.2d at 553 (quoting National League, 426 U.S. at 852, 96 S.Ct. at 2474).

Significant to the Long Island R.R. Court's determination that a publicly-operated commuter railroad is not a traditional governmental function is the fact that passenger transit operations, unlike those traditionally-public activities listed in National League, have historically been performed by the private sector. Emphasizing that the Second Circuit's distinction between freight carriers and passenger railroads did not justify a contrary result, the Court stated:

> Operation of passenger railroads, no less than operation of freight railroads, has traditionally been a function of private industry, not state or local governments. It is certainly true

> that some passenger railroads have come under state control in recent years, as have several freight lines, but that does not alter the historical reality that the operation of railroads is not among the functions traditionally performed by state and local governments. Federal regulation of state-owned railroads simply does not impair a State's ability to function as a State.

Long Island R.R., ___ U.S. _____, 102 S.Ct. at 1354, 71 L.Ed.2d at 554 (footnote omitted).

The result in Long Island R.R. has prompted a reversal in a case presenting the issue that is before us. In Kramer v. New Castle Area Trans. Auth., 677 F.2d 308 (3rd Cir.), cert. denied, ___ U.S. ____, 103 S.Ct. 786, 74 L.Ed.2d ____ (No. 82-701), the Third Circuit reversed the district court basing its decision squarely upon Long Island R.R. The Third Circuit held that the operation of a public

mass transit system is not a function traditionally performed by state and local governments so as to prevent application of the FLSA's overtime provisions to the bus operators employed by the New Castle Area Transit Authority. Unpersuaded by the reality that mass transit systems are being taken over by municipalities and public transportation authorities with increasing regularity, the Kramer court stated that "[s]tates are not free to assume functions historically performed by the private sector and thereby insulate those activities from federal regulation of interstate commerce." 667 F.2d at 309.

More damaging to the cities' position in the instant case is the action taken by the Supreme Court in Donovan v. San Antonio Metropolitan Trans. Auth. ____ U.S. _____, 102 S.Ct. 2897, 73

L.Ed.2d 1309 (1982). In that case, the district court held that local public mass transit systems constitute integral operations in areas of traditional government functions under National League and, therefore, the Secretary of Labor cannot enforce the minimum wage and overtime provisions of the FLSA against local public mass transit systems. San Antonio Metropolitan Trans. Auth. v. Donovan, Civ. No. SA-79-CA-457 (W.D. Tex. Nov. 17, 1981). The government appealed the decision directly to the Supreme Court pursuant to 28 U.S.C.A. § 1252 (1979). The Supreme Court vacated the district court's judgment and remanded the case "for further consideration in light of United Transportation Union v. Long Island R.R. Co., 455 U.S. _____, 102 S.Ct. 1349, 71 L.Ed.2d 547 (1982)." _____ U.S. at _____, 102 S.Ct. at 2897,

73 L.Ed.2d at 1309. By implication therefore, the Supreme Court considers Long Island R.R. of critical importance to the disposition of this issue.

Summarizing the holding of National League, the Long Island R.R. Court stated that the

> emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions generally immune from federal regulations. Rather it was meant to require an inquiry into whether the federal regulation affects basic State prerogatives in such a way as would be likely to hamper the state government's ability to fulfill its role in the Union and endanger its "separate and independent existence."

_____ U.S. at ____, 102 S.Ct. at 1354-55, 71 L.Ed.2d at 554 (quoting National League, 426 U.S. at 851, 96 S.Ct. at 2474). Despite the intimations to the contrary, however, the Long Island R.R.

Court found it extremely difficult to overlook the "historical reality" that operation of railroads have traditionally been performed by private industry. Kramer, 677 F.2d 308, 309.[8]

[1] Historically, mass transit systems have been owned and operated by private companies. Public ownership is a fairly recent development. As late as 1960, 95% of local transit services were privately owned and operated. H.R.Rep. No. 204, 88th Cong. 2nd Sess. reprinted, [1964] U.S. Code Cong. & Ad. News, 2569, 2590. By 1967 the shift from private to public ownership had accelerated to the point that over 50% of transit riders were carried by publicly-owned

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[8] See, e.g., Long Island R.R., ___ U.S. at ___, 102 S.Ct. at 1354, 71 L.Ed.2d at 554.

transit systems. American Public Transit Association, Transit Fact Book 55 (1978-79 ed.). By 1978 publicly-owned systems generated 90% of all total operating revenues, and carried 91% of all passengers conveyed by American transit. Id. Recent studies indicate, however, that between 45% and 52% of all transit operations in the United States are still privately-owned. U.S. Dept. of Transportation, Urban Mass Transportation Administration, A Directory of Regularly Scheduled, Fixed Route, Local Rural Public Transportation Service, 6 (1980); U.S. Dept. of Transportation, Urban Mass Transportation Administration, A Directory of Regularly Scheduled, Fixed Route, Local Public Transportation Service, 17 (1979). The recent conversion of mass transit systems from private to public ownership has been accomplished

in many instances through the impetus of federal funding. The City of Augusta is a prime example. Finding the nation's transit systems in a state of deterioration, Congress enacted the Urban Mass Transportation Act (UMTA) to provide massive federal financial assistance "to State and local governments and their instrumentalities in financing [transit] systems, to be operated by public or private mass transportation companies as determined by local needs." 49 U.S.C.A. § 1601 (b)(3) (1976). Through UMTA, local governments with transit operations are eligible to receive up to 80% of capital outlays, including the cost of acquiring private systems and capital improvements, and up to 50% of operating expenses. 49 U.S.C.A. §§ 1603(a), 1604(e) (1976 & Supp. III 1979). The City of Macon acquired the assets of

Bibb Transit Co. and took over operation of mass transit in Macon without the use of UMTA funds. Although contrary to the process through which Augusta acquired its transit system, this fact does not affect the result we reach today.

Like the Third Circuit, we are of the opinion that expanding state involvement in mass transit does not alter the historical reality of the fact that mass transit is not a function traditionally performed by the state or its subordinate political bodies. Kramer, 677 F.2d 308, 310. As explained in Kramer,

> the states are precluded from claiming, at this late date, that mass transit is a service which they traditionally provide. Tradition must be guaged in light of what actually happened, and what happened is a federal program of local transit service in which

> the state participate as late comer junior partners. There is, therefore, no tradition of the states qua states providing mass transportation. Moreover, since it is undisputed that the national government can set the employment relations in the area of mass transit, it would be unjustified to allow the states, by acquiring functions previously performed by the private sector, to erode federal authority in this area.

677 F.2d at 310 (footnote omitted).

The evidence of "transit captive" citizens in Macon does not change our view. Although a small percentage of Macon's population require public transit, the overwhelming majority of Macon's inhabitants rely upon their own automobiles for transportation. The fact that mass transit is a necessity for a segment of the population does not mean that a municipality's providing of transit service

automatically turns the service into a traditional function of government. Our result is not altered by the probability that private transit companies are "doomed to extinction," thus requiring local governments to shoulder the burden abandoned by the private sector. See Kramer, 677 F.2d 308, 310 n. 1. As the statistics set out above indicate, local mass transit has historically been a function of the private sector.

When analyzed together, the similarities between the Long Island Railroad, the Macon Transit System and Augusta Transit Department reinforce our decision that the FLSA is constitutionally applicable to the plaintiff classes of bus operators. All three systems primarily involve the transportation of commuter passengers within an urban metropolitan area. Like the

commuter train service of the Long Island Railroad, Macon and Augusta's transit systems had been privately-owned and operated for years. The Long Island Railroad was acquired by the Metropolitan Transit Authority in 1966; Macon and Augusta purchased existing transit operations in 1973. Based on the Supreme Court's analysis in Long Island R.R., we hold that the services provided by the Macon Transit System and the Augusta Transit Department cannot be classified as traditional governmental functions. Federal regulation of both transit systems through the FLSA does not impair Macon's or Augusta's ability to function as a municipality nor "endanger [their] separate and independent existence." Long Island R.R., _____ U.S. at _____, 102 S.Ct. at 1355, 71 L.Ed.2d at 544 (quoting National League, 426 at 851,

96 S.Ct. at 2474).

C. Severability

[2] The City of Macon contends that because National League held the overtime provisions of the FLSA inapplicable to certain state and local governmental employees, the overtime provisions are therefore inapplicable to all such employees in the absence of a congressional re-enactment of a constitutionally valid amendment to the FLSA. We disagree. As the district court correctly observed, National League did not entirely vitiate the 1974 amendments on minimum wage and overtime provisions. The amendments were found unconstitutional only "insofar as [they] operate to directly displace the state's freedom to structure integral operations in areas of traditional governmental functions . . ." National League, 426 U.S. at 852, 96

S.Ct. at 2474. The Supreme Court recognized that the minimum wage and overtime provisions were still applicable to the states in areas which are not "integral parts of governmental activities." National League, 426 U.S. at 854 n. 18, 96 S.Ct. at 2475 n. 18. See also Marshall v. City of Sheboygan, 577 F.2d 1,3-4 (7th Cir. 1978). We hold that the FLSA's severability clause controls here: "If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby." 29 U.S.C.A. § 219 (1975). Therefore, no congressional re-enactment is necessary for a constitutionally valid application of the FLSA's overtime provisions

to the public employees involved in these cases.

D. Municipal Ordinance Claim in Alewine v. City Council of Augusta

Because our holding recognizes that the plaintiff class of transit employees are due time and one-half overtime pay under the FLSA, we need not address the pendent municipal ordinance claim providing for a similar result under the Augusta City Code. Suffice it to say here that equitable reduction of the proper amounts due is inappropriate under the federal statute. A dispute exists, however, as to the correct amounts due.[9]

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[9] At a hearing on cross motions for summary judgment, the parties stipulated to a document prepared by the City of Augusta concerning back overtime pay due each plaintiff should he or she prevail. The stipulated amount in the aggregate was $98,428.97. After the district court used this amount to award plaintiffs a partial recovery based on the municipal ordinance, the City of Augusta

It is our opinion that justice would be best served by further inquiry into the contentions raised by Augusta's motion to amend, for it appears that a substantial miscalculation has occurred. If this is the case, it would be manifestly unjust to hold the City of Augusta to the terms of the original stipulation. The law of this circuit is that "a party may be relieved of a stipulation 'to prevent manifest injustice' so long

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9 Continued timely filed a motion to amend the judgment under Fed.R.Civ.P. 52(b), and, in the alternative, a motion for trail pursuant to Fed.R.Civ. P. 59. As grounds for the motion, the City of Augusta contended that the stipulated figure had been miscalculated by approximately $28,000. The affidavit of the City of Augusta's Director of Personnel, which is attached to the motion, states that the stipulated recoveries were inflated in that no credit was given for wages paid at straight-time rate between the forty and forty-eight hours intervals. According to the affidavit, the correct total in the aggregate is $70,225.19. The district court denied the motion.

as 'suitable protective terms or conditions are imposed to prevent substantial and real harm to the adversary.'" Equitable Life Assurance Soc. v. MacGill, 551 F.2d 978, 984 (5th Cir. 1977) (quoting Laird v. Air Carrier Engine Serv., 263 F.2d 948, 953 (5th Cir. 1959)). On remand, the district court shall conduct further proceedings and, observing the guidelines quoted above, determine the correct recovery due under the overtime provisions of the FLSA.

III. CONCLUSION

Based on the above, we affirm the district court's entry of partial summary judgment in Joiner v. City of Macon holding that the City of Macon is not exempt from the overtime provisions of the FLSA with regard to the operation of the Macon Transit System. That case is remanded to the district court

for further proceedings on the remaining issues. We reverse the summary judgment entered in favor of the City of Augusta in Alewine v. City Council of Augusta. That case is remanded to the district court for further proceedings consistent herewith.

AFFIRMED in part, REVERSED in part and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7490
81-7789

D.C. Docket No. 179-113
79-287-MAC

Jimmy Allen ALEWINE, et al.,

Plaintiffs-Appellants,

versus

CITY COUNCIL OF AUGUSTA, GEORGIA,

Defendant-Appellee.

C.D. JOINER, on behalf of himself and others similarly situated,

Plaintiffs-Appellees,

versus

CITY OF MACON,

Defendant-Appellant.

Appeals from the United States District Court for the Middle District of Georgia and Southern District of Georgia

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Before TJOFLAT and HATCHETT, Circuit Judges, and MORGAN, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia and the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED IN PART and REVERSED IN PART; and that this cause be, and the same is hereby, REMANDED, to said District Courts in accordance with the opinion of this Court;

It is further ordered that each party bear their own costs on appeal to be taxed by the Clerk of this Court.

March 7, 1983

ISSUED AS MANDATE: April 11, 1983

5917

NO. 82-1974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CITY OF MACON,

Petitioner

v.

C. D. JOINER, et al.,

Respondents

SUPPLEMENTAL APPENDIX

22pp

W. WARREN PLOWDEN, JR.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

C.D. JOINER, on behalf of himself and others similarly situated,	:	[Filed at 8:30 A.M. on April 27, 1981]
Plaintiffs,	:	
VS.	:	CIVIL ACTION NO. 79-287-MAC
CITY OF MACON,	:	
Defendant.	:	

OWENS, District Judge:

This case is before the court on cross motions for summary judgment. The plaintiffs in the case are employees of the Macon Transit System (MTS); the defendant is the City of Macon. Plaintiffs' action is brought pursuant to the Fair Labor Standards Act (FLSA), as amended, 29 U.S.C.A. §§ 201-219 and seeks a recovery from defendant for hours worked over forty from May 1, 1976,

plus a permanent injuntion compelling defendant in the future to pay time and a half for all overtime work.

The summary judgment motions presently before the court rest on the question of whether the operation of an urban transit system by the City of Macon is an integral operation in an area of traditional governmental functions which is exempted from compliance with the Fair Labor Standards Act by the Tenth Amendment.

Facts

As to the following pertinent facts, there is no dispute.

Prior to December 31, 1972, public transit facilities in the city of Macon were operated by Bibb Transit Company, a privately-owned corporation that had a franchise from the city to operate a transit

system. On November 23, 1971, and again on August 29, 1972, Bibb Transit Company advised the city that it intended to cease operation on December 31, 1972 when its franchise was due to expire. As a result of these notices, a study was done for the city by Allen M. Voorhees and Associates, Inc. of McLean, Virginia, concerning whether or not the city should operate a publicly-owned mass transportation system within the city of Macon. The study was dated December 6, 1972.

On December 31, 1972 the Bibb Transit Company ceased operations and, for the next two weeks, the city was without transit service. On or about January 15, 1973, Bibb Transit Company resumed providing transit service in the city as it had previously done, pursuant to an agreement with the city

whereby it would be paid $25,000 to offset the operating deficit it incurred during a two-month period. This subsidy was made available to the City of Macon by the State of Georgia.

On March 6, 1973, the mayor and council of the City of Macon adopted a resolution authorizing the purchase of certain passenger-carrying vehicles, service vehicles, tools and maintenance equipment, large and small units relative thereto and office furniture from Bibb Transit Company. Possession of the property was transferred to the City on March 15, 1973 and on that date the City entered into a lease of the real estate located at 815 Riverside Drive and commenced operation of a public transit system in Macon.

The MTS operates eleven routes

routes throughout the city. The route system is basically the same as the one operated by the private company in 1972. It services approximately 8,900 people per day (the population of the city of Macon is approximately 100,000). The typical passenger is female (66%), black (89%), middle-aged (80%), low income (80%) and "transit captive," i.e., living in a household that does not have an automobile available to it (95%). Approximately 20% of the passengers are going to and from work.

Funding for the MTS is derived from fares, advertising, charters, and operational subsidies provided by the City of Macon. In addition, the city has used federal revenue sharing funds and grants from the Georgia Department of Transportation to pur-

chase capital items. For example, MTS bought ten new buses with $600,000 of federal revenue sharing funds. The City of Macon has tried to obtain federal transit funding for its system pursuant to the Urban Mass Transportation (UMTA), 49 U.S.C.A. §§ 1601 et seq., however, it has failed to comply with § 13(c) of the Act and consequently is inelegible to receive the funds available--up to 80% financing of net capital investments and up to 50% of operating expense projects. 49 U.S.C.A. § 1604. As a result, the system operates at a huge loss. As of March 31, 1980, the operating subsidy put into the system by the City of Macon since it commenced operation of the transit system was $2,627,466.00.

The MTS was established by the city as an "enterprise fund," i.e.,

an item in which the operations of the enterprise generate income which is supposed to cover a large portion of the cost for that activity. Other enterprise funds maintained by the City are for the Macon Coliseum, the Macon Auditorium and the Bowden Golf Course.

Law

The FLSA, enacted over forty years ago, has as its purpose the regulation of certain aspects of employment in interstate commerce. Primarily, the Act requires covered employers to pay their employees minimum wages plus overtime pay at increased rates for time in excess of a maximum-hour workweek. Currently, the maximum-hour workweek is forty hours per week.

The original version of the Act specifically excluded the states and

their political subdivisions from its coverage. In 1961, however, Congress began to extend the coverage of the Act to some types of public employees. This extension was continued in subsequent amendments and culminated in the 1974 amendments in which Congress extended the minimum wage and maximum hour provisions to cover almost all public employees employed by the states and their political subdivisions. 29 U.S.C.A. § 203(d)(1978).

The constitutionality of these 1974 amendments was tested in the case of National League of Cities v. Usery, 426 U.S. 833, 49 L.Ed.2d 245, 96 S.Ct. 2465 (1976). The appellants in National League of Cities (NLC) contended that when Congress sought, through the 1974 amendments, to directly regulate the activities of states as public employers it

transgressed an affirmative limitation on the exercise of its commerce power, namely the Tenth Amendment. The Supreme Court agreed, holding that to the extent the challenged amendments operated to directly displace the states' freedom to structure "integral operations in areas of traditional governmental functions, they [were] not within the authority granted Congress by Art. I, § 8, cl. 3." The Court determined that the states have a superior right to structure their own agreements with employees engaged in those functions which are essential to the states' separate and independent existence.

NLC thus provided a standard for determining whether the 1974 amendments to the FLSA can be constitutionally applied to a

given state activity. If the state activity is an "integral operation in areas of traditional governmental functions," then the FLSA will not be applicable to that operation. The Court did not, as well it could not, clearly define what is an integral operation and provide an exhaustive list of what are traditional governmental functions. Subsequent cases have therefore attempted to perform this task, thereby more clearly defining the parameters of this standard.

The Fifth Circuit, in performing this task, has found Justice Blackmum's concurring opinion in NLC to be helpful. Peel v. Florida Dept. of Transportation, 600 F.2d 1070 (5th Cir. 1979); Public Service Co. of North Carolina v. Federal Energy Regulatory Commission, 587 F.2d 716 (5th Cir. 1979).

Justice Blackmun suggested that the Court's opinion had adopted a balancing approach whereby the state and federal interests affected would be weighed, and where the federal interests affected would be weighed, and where the federal interest is demonstrably greater and state compliance essential, the federal interest would prevail.

The Fifth Circuit has not ruled definitively on whether municipal transit systems are traditional governmental functions and such a ruling is not likely. The reason for this is that any determination of traditional governmental functions must necessarily be made in the context of the specific facts before the court. The states' interest may weigh more heavily in one case than another, depending on

the particular facts involved.

The Fifth Circuit has interpreted NLC as having a narrow holding which is limited to the following circumstances: First, the undertaking must be a traditional function essential to the sovereign existence of the state. Public Service Co., supra at 721; Pearce v. City of Wichita Falls, 590 F.2d 128, 132 (5th Cir. 1979); Peel, supra at 1083. Second, the effect of the federal law must be to "directly desplace" the state function. Peel, supra at 1084; Public Service Co., supra at 721. Finally, the effect on state functions must be balanced against the weight of the federal interest and the federal interest found insufficient.

Review of the facts presently before the court shows that the

defendant has failed to meet any of these requirements. First, this transit service to fare-paying passengers is not a traditional function essential to the sovereign existence of the state. In Macon, only about 10% of the citizens use the transit system at all; private automobiles provide the overwhelming majority of transit in Macon. In addition, the MTS was established by the City of Macon as an "enterprise fund," thus expected in large part to pay its own way. The routing, scheduling and administration of the MTS continues to be almost exactly the same as was that of the private Bibb Transit operation, with economic considerations prevailing over community needs when routing decisions are necessary. In summary,

the operation of the MTS is "indistinguishable from like commercial activities of private business. It is precisely this sort of state activity that may be subject to federal regulation." Public Service Co., supra at 721.

Second, requiring defendant to comply with FLSA will not "directly displace" the state function. The large majority of transit systems in the country already provide overtime compensation for hours worked over forty, without apparent disruption. Indeed, the real impact on the MTS comes not from the wages of garage employees and bus drivers, but from the cost of fuel and insurance.

Finally, when the federal and state interests are balanced, the federal interests predominate. There

is a profound federal commitment to and involvement in transit as illustrated by the legislative history of the Urban Mass Transportation Act. Following are several of the federal interests listed in the Report of the Senate Committee on Banking and Currency on S.6, 88th Cong., 1st Sess. (1963):

(1) The continued vitality and growth of the urban areas is essential to the national welfare.

(2) Traffic congestion and inadequate urban transportation place a great burden on the national economy. Traffic jams cost the nation an estimated $5 billion a year in time and wages lost, extra fuel consumption, faster vehicle depreciation, lower downtown commercial sales, etc.

(3) Traffic congestion also adds to the cost of moving inter-

state freight through metropolitan areas, because trucks must compete for clogged street space with automobiles. (p. 12-14)

In view of the above, it cannot be said that the Macon Transit System is an integral operation in an area of traditional governmental functions which would be exempted from the requirements of the FLSA.

Severability

Additionally, defendant argues that because the overtime provisions of the FLSA have been held to be inapplicable to a number of state and local governmental employees that these provisions are therefore inapplicable to all such employees in the absence of a congressional re-enactment of a constitutionally valid amendment to the FLSA. This is not a valid argument as to the

applicability of the FLSA for several reasons. First, NLC does not entirely vitiate the 1974 amendments on minimum wage and overtime provisions. As discussed, supra, the amendments were found to be unconstitutional only to the extent that they operate to displace the states as to integral operations in areas of traditional governmental functions. In addition, the FLSA contains a severability clause: "If any provision of this chapter or the application of such provision to any person or circumstance is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby. 29 U.S.C.A. § 219 (1976).

After reviewing the pleadings, depositions and accompanying exhibits,

affidavits, and parties' memoranda, the court concludes there is no genuine issue as to any material fact and plaintiffs are entitled to judgment as a matter of law on the issue before the court.

Accordingly, plaintiff's motion for partial summary judgment on the issue of the application of the Fair Labor Standards Act to defendant is hereby GRANTED. Pursuant to Rule 56(d), Fed. R. Civ. P., this court will set a date for further proceedings on the remaining issues in this case.

SO ORDERED, this 24th day of April, 1981.

WILBUR D. OWENS, JR.
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

C.D. JOINER, on behalf of himself and others similarly situated,	:	[Filed at 10:30 A.M. on July 6, 1981]
Plaintiffs,	:	
VS.	:	CIVIL ACTION NO. 79-287-MAC
CITY OF MACON,	:	
Defendant.	:	

ORDER AND CERTIFICATE FOR IMMEDIATE REVIEW PURSUANT TO 28 U.S.C. §1292(b)

This case is an action brought by employees of the Macon Transit System pursuant to the Fair Labor Standards Act, as amended, 29 U.S.C.A. §§201-219. The plaintiffs seek to recover wages for overtime hours they contend are due them pursuant to the Act as well as an injunction compelling future payments for over-time work.

By order of this Court dated

April 27, 1981, the Court granted a partial summary judgment to the plaintiffs based on its reading of National League of Cities v. Ussery, 426 U.S. 833 (1976). In its order the Court concluded that the City of Macon is not exempt from the provisions of the Fair Labor Standards Act with regard to the operation of the Macon Transit System.

The defendants have requested that the court amend its order to include a Certificate of Immediate Review Pursuant to 28 U.S.C. §1292(b). They point out that in similar litigation around the country, other courts that have addressed to this issue have concluded that a local transit system is an integral government function and is therefore not subject to the provisions of the Act. See United Transportation

Union v. Long Island Railroad, Co., 634 F.2d 19 (2 Cir. 1980); Alewine v. City Council of Augusta, Georgia, 505 F.Supp. 880 (S.D.GA. 1981); Kramer v. New Castle Area Transit Authority, No: 80-1008G (W.D.Pa. June 11, 1981) (Order granting Summary Judgment); Frances v. City of Tallahassee, No: 79-446 (2d Cir. Fla. Dec. 8, 1980).

IT IS, THEREFORE, ORDERED, that this Court's order entered on April 27, 1981 is amended for the purpose of complying with 28 U.S.C. §1292(b) by the instant order.

IT IS FURTHER ORDERED, that this Court is of the opinion that its order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this Court's ruling on the

aforementioned issue, may materially advance the ultimate termination of this litigation by resolving the question of the applicability of the Fair Labor Standards Act to a local mass transportation system.

IT IS FURTHER ORDERED, that the court is of the opinion that the interest of justice and judicial economy would be best served if this case were to be consolidated with Alewine v. City Council of Augusta, Georgia, which is now pending before the United States Court of Appeals for the Fifth Circuit (appeal docketed June 9, 1981, No. 81-7490).

So orcered at Macon, Georgia this 6th day of July, 1981.

WILBUR D. OWENS, JR.
United States
District Judge

No. 82-1974

In the Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF MACON, PETITIONER

v.

C.D. JOINER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1974

CITY OF MACON, PETITIONER

v.

C.D. JOINER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner seeks review of the judgment of the court of appeals holding that the overtime pay provisions of the Fair Labor Standards Act, 29 U.S.C. (& Supp. V) 201 *et seq.*, may constitutionally be applied to the employees of a publicly owned transit system.[1] As petitioner observes (Pet. i; see also Pet. 16-18), the question presented by the petition is the same as that presented in *Donovan* v. *San Antonio Metropolitan Transit Authority*, appeal docketed, No. 82-1951 (June 1, 1983), and the companion case, *Garcia* v. *San Antonio Metropolitan Transit Authority*, appeal docketed, No. 82-1913 (May 26, 1983). This case accordingly should

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[1]This case was decided by the court of appeals together with *Alewine* v. *City Council*, which presents the same issue. The court of appeals' decision, which bears the latter caption, is reported at 699 F.2d 1060. A petition for rehearing in *Alewine* was denied on May 19, 1983.

be held and disposed of as appropriate in light of the final disposition of the pending appeals in the San Antonio case. Petitioner has not identified any circumstance that makes plenary consideration of this case necessary, given the purely legal dimensions of the common question presented here and in the San Antonio case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be held for appropriate disposition in light of *Donovan* v. *San Antonio Metropolitan Transit Authority,* No. 82-1951, and *Garcia* v. *San Antonio Metropolitan Transit Authority,* No. 82-1913.

REX E. LEE
Solicitor General

JULY 1983

DOJ-1983-07

No. 82-1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF MACON,

Petitioner

v.

C. D. JOINER, *et al.*,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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IN THE

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Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

The question presented by the petition for a writ of certiorari in this case is whether the wage and hour provisions of the Fair Labor Standards Act (hereafter "FLSA") may constitutionally be applied to a publicly owned and operated mass transit system. The holding of the court below, that the FLSA *may* constitutionally be so applied, is consistent with, and in our view compelled by, *United Transportation Union v. Long Island Rail Road Co.*, 455 U.S. 678. Two other courts of appeals have reached the same conclusion as the court below: *Kramer v. New Castle Area Transit Authority*, 677 F.2d 308 (C.A. 3), *cert. den.*, No. 82-701 (Jan. 17, 1983); and *Dove v. Chattanooga Area Regional Transportation Authority*, 701 F.2d 50 (C.A. 6).

There is no contrary court of appeals' authority but there is one district court holding that the FLSA may

not constitutionally be applied to publicly owned and operated mass transit systems. *San Antonio Metropolitan Transit Authority v. Donovan*, 557 F. Supp. 445 (W.D. Tex.). Appeals from that decision have been taken to this Court in *Joe G. Garcia v. San Antonio Metropolitan Transit Authority* (No. 82-1913), docketed May 26, 1983, and *Donovan v. San Antonio Metropolitan Transit Authority* (No. 82-1951), docketed June 1, 1983.

For the reasons set forth in the *Garcia* jurisdictional statement (No. 82-1913), we believe that, particularly in light of the well-reasoned contrary decisions of the Third, Sixth and Eleventh Circuits, summary reversal of the district court's decision in the *San Antonio* case is the appropriate course because the argument against constitutionality is not sufficiently substantial to warrant plenary consideration.[1] If this Court does summarily reverse in the *San Antonio* case, the petition for a writ of certiorari should be denied in the present case. Alternatively, if probable jurisdiction is noted in the earlier filed *San Antonio* case and that case is set for argument, disposition of the petition for certiorari herein should await decision in *San Antonio*.

Respectfully submitted,

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[1] We are serving on counsel for petitioner the *Garcia* jurisdictional statement together with this memorandum.

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No. 82-1974

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CITY OF MACON,

Petitioner

v.

C. D. JOINER, *et. al.*,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether an activity that now is predominantly conducted by local governments is precluded from being a protected "governmental function" because it formerly was conducted by private enterprise.

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Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE NATIONAL LEAGUE OF CITIES, THE NATIONAL GOVERNORS' ASSOCIATION, THE NATIONAL ASSOCIATION OF COUNTIES, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, AND THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

INTEREST OF THE AMICI

The *amici* are organizations which represent state and local governments located throughout the United States. *Amici* and their members have a vital interest in the powers and responsibilities of these governments, and in legal issues affecting such powers and responsibilities. As made clear *infra*, issues of profound consequence for the authority and functions of state and local jurisdic-

tions are presented by this case. *Amici* are therefore submitting this brief to assist the Court in its consideration of the questions raised by this litigation.[1]

STATEMENT

1. Prior to 1973 the transit system of Macon, Georgia was owned by a private company, Bibb Transit Company.[2] Bibb operated the system under a franchise granted by the city. Bibb was losing money on the system, and thus notified the city that it intended to cease operations. The cessation would leave citizens without essential transportation services.

Operations did cease during the first two weeks of 1973. Thereafter, to ensure that citizens received necessary transportation, Macon first provided Bibb with a two-month operating subsidy, and then purchased and began operating the transit system. The city's system provides the only transit services in Macon.

Ninety-five percent of the persons riding the city's system are "transit captive," that is, live in a household having no automobile. As well, eighty-nine percent are black, eighty percent are middle aged, eighty percent have low incomes, and sixty-six percent are female. Twenty percent are going to and from work.

Macon's transit system operates at a loss, with the city providing operating subsidies. In addition to these subsidies, funds are received from fares, advertising revenues, and charter income. No money for operations or capital acquisitions has been received from the federal

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[1] Pursuant to Rule 36, the parties have consented to the filing of this *amicus* brief. Their letters of consent have been lodged with the Clerk of the Court.

[2] The facts set forth in part 1 of this statement are contained in the decision below. *Joiner* v. *City of Macon*, 699 F.2d 1060 (11th Cir. 1983).

government under the Urban Mass Transportation Act (UMTA), 49 U.S.C.A. § 1601 *et. seq.*[3]

2. In December 1979, employees of the city's transit system filed a suit claiming they are covered by wage and hour provisions of the Fair Labor Standards Act (FLSA), 29 U.S.C.A. § 207 (Supp. 1982). Macon responded that such coverage violates Tenth Amendment limitations upon Congress' power over commerce, limitations expressed in this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), which also involved the FLSA's wage and hour provisions.

The district court ruled against Macon and the Court of Appeals affirmed. The Eleventh Circuit focused on whether a city's provision of mass transit services is a "traditional" governmental function under the third prong of the test this Court has used for judging whether a state or local government activity is protected by the Tenth Amendment. In its entirety, the third prong is that "it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions' ". *EEOC* v. *Wyoming*, —— U.S. ——, ——; 103 S.Ct. 1054, 1061 (1983). The Court of Appeals ruled that the provision of mass transit is not a "traditional" governmental function and therefore cannot meet the third prong of the test.

The Eleventh Circuit recognized that by 1967 fifty percent of all transit riders were carried on publicly-owned systems, and that by 1978 ninety-one percent of all riders and ninety percent of all operating revenues were carried on or generated by public systems. It also recognized "the probability that private transit companies are 'doomed to extinction,' thus requiring local governments to shoulder the burden abandoned by the private sector."

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[3] Macon did receive state grants and federal revenue sharing funds for capital outlays.

699 F.2d at 1069. Nonetheless, it ruled there could be no Tenth Amendment protection because "[h]istorically, mass transit systems have been owned and operated by private companies," with "[p]ublic ownership [being] a fairly recent development." 699 F.2d at 1068.

The court explicitly followed the lead of a sister circuit—the third—which was "[u]npersuaded by the reality that mass transit systems are being taken over by municipal and public transportation authorities with increasing regularity."[4] Concomitantly, the court declined to follow a First Circuit decision[5] holding "that the maximum hour provisions of the FLSA cannot constitutionally be applied to public transit employees." 699 F.2d at 1067. As authority for its position, the Eleventh Circuit asserted reliance on this Court's decision in *United Transportation Union* v. *Long Island R.R.*, 455 U.S. 678, 102 S.Ct. 1349 (1982). Thus, the court below said that "[s]ignificant to the *Long Island R.R.* Court's determination that a publicly-operated commuter railroad is not a traditional governmental function is the fact that passenger transit operations . . . have historically been performed by the private sector.[6] 699 F.2d at 1067.

The court's view of the instant case was not altered by the fact that public transportation "is a necessity for a segment of the population" which is "transit captive."[7] 699 F.2d at 1069. Rather than being affected by this, the

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[4] The court followed *Kramer* v. *New Castle Area Trans. Auth.*, 677 F.2d 308 (3rd Cir. 1982), cert. den., —— U.S. ——; 103 S.Ct. 786 (1983).

[5] *Molina-Estrada* v. *Puerto Rico Highway Authority*, 680 F.2d 841 (1st Cir. 1982).

[6] In *Long Island*, private companies operated fifteen of the seventeen commuter railroads existing at the time of suit. 455 U.S. at 1354, n.12.

[7] As stated earlier, 95 percent of the system's riders are "transit captive."

court said a majority of Macon's citizens "rely upon their own automobiles for transportation." 699 F.2d at 1069. And though the court stressed that acquisition by cities of mass transit systems was often accomplished by use of funds received under the UMTA, its decision was also unaltered by the fact that Macon had received no such funds.

REASONS FOR GRANTING THE WRIT

A. Introduction

The court below ruled that Macon's municipally-owned transit system was not a "traditional" governmental function because transit services formerly were provided by private enterprise. Thus, said the court, the Tenth Amendment does not protect the Macon system against application of federal wage and hour regulation. This ruling raises issues of profound national importance for mass transit and for other essential services that state and local governments have increasingly found it necessary to supply. As well, the lower court's ruling misapplies and is contrary to this Court's decision in *United Transportation Union* v. *Long Island R.R., supra.* Finally, the decision below, and similar decisions of the Third and Sixth Circuits, directly conflict with a decision of the First Circuit and with a district court decision on which the federal government is seeking a direct appeal in this Court. *San Antonio Metropolitan Transit Authority, et. al.* v. *Donovan, et. al.*, 557 F.Supp. 445 (D.C.W.D. Tex., 1983), appeals docketed, Nos. 82-1913 and 82-1951, O.T. 1982.

Because the decision below raises issues of vital importance, is contrary to a decision of this Court, and is one of a group of directly conflicting cases, this Court should grant *certiorari.* A grant is essential so that the Court may provide badly needed guidance on when an activity conducted by state and local governments is a "governmental function" eligible for protection under the Tenth Amendment.

B. This Case Presents Issues of Profound Importance

1. As stated above, prior to 1973 mass transit services in Macon were provided by a private company. Because that company was losing money, it determined to cease operations. The cessation would have left a segment of Macon's population devoid of transport services essential to their daily lives. The city thus determined to acquire and operate the transit system in order to preserve services vital to citizens.

Macon's experience is typical of the general experience with mass transit in this country. Until the 1960's mass transit was generally provided by private companies everywhere in the nation. However, these companies began experiencing serious financial difficulties because mass transit was not profitable. Thus, throughout the country local governments had to acquire and operate transit systems to preserve an essential element of the social infrastructure. For the curtailment or collapse of mass transit would have been highly detrimental to urban society and would have been especially harmful to the millions of low income individuals, elderly persons, students, and others who lack access to automobiles and must rely on public transport to conduct their daily activities.[8]

The national shift from privately-owned to publicly-owned mass transit systems proceeded with dispatch. By

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[8] In recognition that "[e]fficient and economical mass transportation is essential to the people who live in and around our urban centers," Congress enacted the Urban Mass Transportation Act of 1964 to provide funds for local governments to acquire and operate mass transit systems. H.Rep. No. 204, 88th Cong., 2d Sess., 1964-2 U.S. Code Cong. & Admin. News 2569 at 2571. Congress subsequently declared (1) that "in recent years the maintenance of even minimal mass transportation service in urban areas has become so financially burdensome as to threaten the continuation of this essential public service," and (2) that "immediate substantial Federal assistance is needed to enable many mass transportation systems to continue to provide vital service." *National Mass Transportation Assistance Act of 1974*, 49 USCA § 1601b(4) and b(6).

1978, publicly-owned systems accounted for 91 percent of all riders, 91 percent of total vehicle miles, 90 percent of all transit revenues and 87 percent of total transit vehicles.[9] *Kramer* v. *Newcastle Area Trans. Auth., supra*, 677 F.2d at 309; *Joiner* v. *City of Macon, supra*, 699 F.2d at 1068.

The Court of Appeals recognized the overwhelming trend toward publicly-owned systems. It was also aware that privately-owned transit systems would probably become extinct. Yet it held that publicly-owned transit systems could not qualify for Tenth Amendment protection because in past years mass transit systems had been owned by private enterprise. Nor was the court swayed by the fact that, as is also true in other urban areas, Macon's publicly-owned system is essential to an important segment of the population. It dismissed this fact with the observation that an even larger segment of Macon's population can use automobiles.

The court's ruling raises a profound legal question. For under the court's decision an activity which is predominantly conducted by governments, and is critical to the welfare of millions of their citizens, is nonetheless ineligible to be a protected "governmental function." Such a decision makes serious inroads upon the sovereign authority of state and local governments to provide for the welfare of their citizens. It will also cost these governments large amounts of money because it completely precludes crucial activities from receiving Tenth Amendment immunity against federal regulation. It is hardly self-evident that such a decision represents the true state

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[9] Approximately one-half the mass transit systems remained privately-owned, but these were the smaller systems. (Some of them even have but one vehicle.) According to statistics presented to this Court by the American Public Transit Associaiton, mass transit was publicly-owned in at least 100 of the 106 urban areas having a population exceeding 200,000. Motion To Affirm, p. 16. *Donovan* v. *San Antonio Metropolitan Transit Authority and American Public Transit Association*, 457 U.S. 1102, 102 S.Ct. 2897 (1982).

of the law. Rather, the decision raises the vital issue of whether the concept of governmental function can exclude an activity now conducted mainly by governments and essential to their citizens. This important issue plainly requires clarification by this Court.

2. As shown by the example of mass transit, state and local governments are not static. Rather, they change their activities over time, as required by the needs of their citizens. In recent decades, state and local governments have increasingly had to supply their citizens with essential services, including ones that are part of the infrastructure of the nation. Thus, in addition to providing mass transit, these governments have had to provide airports,[10] waste disposal facilities,[11] hospitals,[12] nursing homes,[13] utility services,[14] and other necessities of life. At times, the services were previously provided by private enterprise or may still be supplied by it in varying degrees. At other times, private enterprise may not have supplied the service or may have stopped doing so because of inability to make a profit. Whichever the case, state and local governments, which now provide the services or contemplate doing so, need to know the circumstances in which their activities will be "traditional governmental functions" eligible for immunity from federal regulation.

The decisions of lower courts have not provided state and local governments with the necessary guidance. For while there have been attempts to fashion tests for determining a "traditional governmental function," see *Amers-*

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[10] *Amersbach* v. *City of Cleveland*, 598 F.2d 1033 (6th Cir. 1979).

[11] *Hybud Equipment Corp.* v. *City of Akron, Ohio*, 654 F.2d 1187 (6th Cir. 1981), *vacated and remanded on other grounds*, 455 U.S. 931, 102 S.Ct. 1416 (1982).

[12] See e.g., *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, —— U.S. ——, 103 S.Ct. 104 (1983).

[13] *NLRB* v. *Highview, Inc.*, 590 F.2d 174, *vacated in part on other grounds*, 595 F.2d 339 (5th Cir. 1979).

[14] *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

bach v. *City of Cleveland, supra,* lower tribunals have taken inconsistent juridical positions[15] and reached inconsistent results, as demonstrated *infra* in regard to mass transit itself. The situation requires the guidance which only this Court can give on the question of when an activity is a protected governmental function. A grant of certiorari is necessary so the Court may determine an issue of great importance to the nation.[16]

C. The Decision Below Is Inconsistent With This Court's Opinion in Long Island R.R.

In ruling that Macon's publicly-owned transit system cannot receive Tenth Amendment immunity, the Eleventh Circuit repeatedly claimed that it was following this Court's decision in *Long Island R.R., supra.* 699 F.2d at 1067, 1068, 1069. This asserted reliance suffuses the opinion below.[17] However, the decision below misapplies

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[15] Thus, though the Sixth Circuit has ruled that airports are a traditional governmental function, *Amersbach* v. *City of Cleveland, supra,* and other courts have ruled that mass transit is *not* such a function, the First Circuit could see "no meaningful distinction" between airports and activities which included plans for mass transit. *Molina-Estrada, supra,* 680 F.2d at 846.

[16] A decision shedding light on when an activity is a traditional governmental function will likely shed light as well on what constitutes an indisputable attribute of state sovereignty. Such illumination will arise because governmental functions and attributes of sovereignty must have some overlap. Otherwise, an action could be a sovereign act but not a governmental function, a result which does not seem self-evidently correct. Illumination of attributes of sovereignty is desirable because the second prong of the test for assessing Tenth Amendment immunity requires that federal regulation address " 'an undoubted attribute of state sovereignty' ", but what constitutes such an attribute "is somewhat unclear" and the Court's cases "have had little occasion to amplify on our understanding of the concept." *EEOC* v. *Wyoming, supra,* 103 S.Ct. at 1061, n.11.

[17] Thus, after citing decisions holding the Tenth Amendment applicable to mass transit, the court said "We choose not to follow these decisions, however, in light of *United Transp. Union* v. *Long Island R.R.*" 699 F.2d at 1067. The Court then made an extensive attempt to show that the *Long Island R.R.* case and the present one

and is contrary to *Long Island.* This is true both as a factual matter and a legal one.

As a factual matter, the "historical reality" in *Long Island R.R.* was totally different than in the present case. In *Long Island,* the Court pointed out that "[a]t the time of this suit, there were 17 commuter railroads in the United States; only two of those railroads were publicly-owned and operated, both by the Metropolitan Transportation Authority." 455 U.S. at 686, n.12; 102 S.Ct. at 1354, n.12. Since only two of the seventeen commuter lines were publicly-owned and fifteen were privately-owned, it was plain that commuter railroads had "traditionally been a function of private industry, not state or local governments." 455 U.S. at 686, 102 S.Ct. at 1354. In the present case, by contrast, mass transit operations are overwhelmingly public, with publicly-owned systems accounting for 91 percent of the riders, 91 percent of the vehicle miles, 90 percent of the revenues, and 87 percent of the vehicles.[18]

As a legal matter, the court below departed from teachings set forth in *Long Island.* The *Long Island* Court said it was not "looking only to the past to determine what is 'traditional' ". 455 U.S. at 686, 102 S.Ct. at 1354. It stressed that the "emphasis on traditional governmental functions and traditional aspects of state sovereignty was not meant to impose a static historical view of state functions." *Ibid.* Rather, the purpose was to de-

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are similar because "[h]istorically, mass transit systems have been owned and operated by private companies." *Id.* at 1068. And, subsequent to its extensive attempt, the Court ruled that "[b]ased on the Supreme Court's analysis in *Long Island R.R.*, we hold that the services provided by the Macon Transit System . . . cannot be classified as traditional governmental functions." *Id.* at 1069.

[18] Another difference in the historical reality of the two cases is that railroads had been subject to comprehensive federal regulation for almost 100 years. 455 U.S. at 687, 102 S.Ct. at 1355. Mass transit, by contrast, has historically been subject primarily to state and local regulation.

termine whether a federal regulation will hinder a state "government's ability to fulfill its role in the Union," 455 U.S. at 687, 103 S.Ct. at 1355, or will "undermine the role of the states." 455 U.S. at 686, 103 S.Ct. at 1354.

In the present case, however, the court below has indeed imposed "a static historical test of state functions," a test which freezes the concept of governmental functions as of some earlier date in history. Such is the plain consequence of ruling that, even though mass transit now is predominantly provided by public bodies, it is not a protected governmental function because until the early 1960's it was largely supplied by private enterprise. The historically frozen test imposed by the court below prevents the concept of governmental function from evolving when state and local governments find it necessary to provide services which are essential to the welfare of citizens but can no longer be supplied by private enterprise. It thereby hampers the ability of state and local governments to fulfill their role in the Union. This is a misapplication of and contrary to this Court's decision in *Long Island R.R.*

D. The Decision Below Directly Conflicts With Another Court of Appeals Decision and With a District Court Decision That Is On Direct Appeal to This Court

In rendering its decision, the court below explicitly said "[w]e choose not to follow" the decision of the First Circuit in *Molina-Estrada, supra.* 699 F.2d at 1067. In *Molina*, the issue was whether the statutory powers and activities of the Puerto Rico Highway Authority constituted traditional governmental functions. 680 F.2d at 842, 843-847. The Authority provided for the building, upkeep and operation of roads, operated some parking lots, and planned to exercise the power to build a mass transit system. 680 F.2d at 842, 845. The First Circuit ruled that these powers and activities, including mass transit, constituted traditional governmental functions.

There is thus a direct conflict between the Eleventh Circuit decision below, which held that mass transit is *not* a traditional governmental function, and the First Circuit decision in *Molina-Estrada*, which ruled that it *is* such a function.[19]

There is also another pertinent conflict. The decision below is contrary to the district court decision in a case in which the federal government has filed a jurisdictional statement on direct appeal to this Court. *San Antonio Metropolitan Transit Auth., et. al.* v. *Donovan, et al., supra.* In *San Antonio* the court ruled that mass transit is a traditional governmental function protected against federal wage and hour regulation by the Tenth Amendment. The court recognized that mass transit historically had been provided by private enterprise,[20] 557 F. Supp. at 448, but pointed out that many of today's governmental functions "have at some time in the past been private functions," *id.* at 450, and ruled that "[t]o deny Tenth Amendment immunity on the ground that in the past the private sector was heavily involved in providing transit services would impose precisely the 'static historical test of state functions' that *L.I.R.R.* eschews." *Ibid.* The *San Antonio* decision is thus plainly irreconcilable with the decision below, and the federal government's direct appeal in that case further exemplifies the propriety of hearing this one, too.[21]

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[19] The same conflict also exists between *Molina-Estrada* and the decisions of the Third and Sixth Circuits in *Kramer* v. *New Castle Trans. Auth., supra,* and *Dove* v. *Chattanooga Area Regional Trans. Auth.*, 701 F.2d 50 (6th Cir. 1983). For, like the court below, which relied upon *Kramer*, the *Kramer* and *Dove* courts ruled that mass transit is not a traditional governmental function.

[20] It had done so pursuant to state and local government regulation, however, as the court explicitly made clear. 557 F. Supp. at 448. There had been no federal regulation that would be eroded by Tenth Amendment immunity. *Id.* at 448-450.

[21] A plenary hearing is desirable in both cases. For each case presents certain differing facets of the same problem. Thus, *Macon* contains judicial findings showing that an overwhelming percentage

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* in this case.

Respectfully submitted,

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of the citizens who use mass transit are dependent upon it, while in *San Antonio* the publicly-owned transit system received UMTA funds from the federal government.

If a plenary hearing is granted in only one case, the other should be retained on the docket pending the Court's plenary decision.